No. 22,197

nited States Court of Appeals

FOR THE NINTH CIRCUIT

CASCADE EMPLOYERS' ASSOCIATION, INC.,
CORVALLIS SAND & GRAVEL CO.,
EUGENE SAND & GRAVEL CO.,
and
WILDISH SAND & GRAVEL CO.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition To Review and Modify an Order of
the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
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National Labor Relations Board.

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon the petition of Cascade Employers' Association, Inc. (hereinafter referred to as "Cascade"), Corvallis Sand & Gravel Co., Eugene Sand & Gravel Co.,

and Wildish Sand & Gravel Co. (hereinafter referred to as "the Companies") to review and modify an order of the National Labor Relations Board (R. 93-97).[1] The Board's Decision and Order issued on March 13, 1963, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*) and are reported at 141 NLRB 469. This Court has jurisdiction of the proceeding under Section 10(f) of the Act, the unfair labor practices having occurred in and around Portland, Oregon, within this judicial circuit.

COUNTERSTATEMENT OF THE CASE

I. PROCEEDINGS BEFORE THE BOARD; CASCADE FAILS TO REQUEST A REIMBURSEMENT ORDER

Petitioners herein are the bargaining agent of a multi-employer bargaining unit (hereafter referred to as Cascade), and three of the employers who are members of that unit (hereafter referred to as the Companies). Cascade had a collective bargaining contract with the Hoisting and Portable Engineers Local Union No. 701 (hereafter referred to as the Union). When this contract expired on December 31, 1958, the members of the multi-employer unit sought to bargain for new contract terms with the Union through their bargaining representative, Cascade. The conduct of these negotiations gave rise to unfair labor practice proceedings before the Board.

On August 12, 1959, Cascade, on behalf of its members, filed unfair labor practice charges alleging that the Union had refused to bargain collectively with it as the representative of the established multi-employer unit and that it had restrained and coerced the Companies in their selection of a bargaining representative. Cascade and the Companies were parties to the ensuing unfair labor practice proceeding.

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[1] "R" references are to pages of Volume I of the record as reproduced according to Rule 10 of the Rules of this Court. References designated "Tr." are to the reporter's Transcript of the testimony as reproduced in Volume II of the record.

On September 8, 1960, subsequent to a hearing, the Trial Examiner issued his Intermediate Report, finding that the Union had violated its statutory duty by refusing to bargain with Cascade, and by coercing the Companies into signing separate contracts with it. He recommended that the Union cease and desist from its refusal to bargain and from giving effect to the individual contracts executed with the Companies (R. 30, 31). The Trial Examiner made no recommendation that the Union reimburse the Companies for any monies paid into its health and welfare funds pursuant to the contracts, or for any additional wages paid pursuant to these contracts. Neither Cascade nor the Companies had asked the Trial Examiner to recommend a reimbursement order. Cascade did not except to any of the Trial Examiner's findings, nor did it ask the Board to enlarge upon his recommended remedial order. Indeed, Cascade filed a brief in support of the Trial Examiner's Intermediate Report and Recommended Order.

On July 31, 1961, the Board reversed the Trial Examiner's findings of violation of the Act on the ground that Cascade was not the historically established multi-employer unit, and that, consequently, the Union was not obliged to bargain with Cascade (R. 64-66). Thereafter, both the General Counsel and Cascade filed motions for reconsideration of the Board's Decision. The Board granted the motions and ordered further hearings for the purpose of receiving evidence on the multi-employer unit issue, "including whether or not Cascade was attempting to bargain for the historically established multi-employer bargaining unit" (R. 71).

On June 28, 1962, the Trial Examiner issued his Supplemental Intermediate Report, recommending that the Board reaffirm its earlier dismissal of the case (R. 74-78). Cascade filed timely Exceptions to the Trial Examiner's Supplemental Report (R. 79-82). Cascade excepted to the Trial Exaimer's failure to find that the Union had illegally refused to bargain and coercively obtained individual contracts. However, its exceptions and supporting brief again made no mention of a failure to order reimbursement of funds.

II. THE BOARD'S CONCLUSION AND ORDER

In its Supplemental Decision and Order, issued on March 13, 1963 (R. 84-91), the Board found that the Union had violated Section 8(b) (1) (B) and (3) of the National Labor Relations Act, by restraining and coercing the Companies in their selection of Cascade as their bargaining representative in a historically established multi-employer unit. and by refusing to bargain with Cascade. The Board further found that the Union's pressure had succeeded in forcing the petitioning Companies to execute individual bargaining agreements with the Union and ordered the Union to cease and desist from restraining or coercing any employer represented by Cascade in the selection of Cascade as its representative for collective bargaining purposes, from refusing to bargain collectively with Cascade with respect to employees in the appropriate bargaining unit, and from giving effect to the individual contracts executed with the Companies. Affirmatively, the Board ordered the Union to bargain with Cascade and to post appropriate notices.

In June of 1963 the case before the Board was closed, the Union having satisfactorily complied with the affirmative requirements of the Board's order.

III. THE SUBSEQUENT STATE COURT LITIGATION

Two years later, on June 8, 1965, the Companies filed complaints in the Circuit Court, Multnomah County, Oregon, against the Union, its officers, and the trustees of the Union's health and welfare and pension funds. Based on the Board's finding that the individual contracts were unlawfully procured, the complaints sought rescission and restitution from the Union and the Trustees of sums paid thereunder. The Companies sought to recover from the Union the additional wages paid thereunder to Union members; and from the health and welfare trustees and pension trustees the sums paid to their respective funds for the benefit of members of the Union. The defendants filed demurrers on the ground that state court jurisdiction over the subject matter was pre-empted by the Labor Management

Relations Act and that the complaints did not state a cause of action because they showed plaintiffs sought, obtained and accepted relief from the Board without asking for the relief sought in the state court suits. The Circuit Court sustained the demurrers and dismissed the actions.

On appeal, the Oregon Supreme Court affirmed the trial court, holding that the Companies' claims for rescission of the contracts and restitution of the monies paid thereunder rested solely on the ground that the contracts were procured through the unfair labor practices of the Union, and that "there is no state right which the court is requested to vindicate." *Corvallis Sand & Gravel Co. v. Hoisting & Portable Eng.*, 419 P.2d 38, 42 (1966). Accordingly, the court concluded that the fashioning of a remedy for the wrong that was the gravamen of the complaints was within the exclusive province of the Board, and that the state court was thus without jurisdiction of the suits.

Subsequent to this ruling, the Companies petitioned the United States Supreme Court to review the state court's pre-emption ruling.[2] The Companies contended that the Board lacked power to order reimbursement by the trustees and that the Oregon suit was, therefore, not pre-empted. At the invitation of the Supreme Court (386 U.S. 931), the Solicitor General submitted a memorandum expressing the views of the United States. In that memorandum, a copy of which has been lodged with the Court by petitioners, it was urged, on the authority of *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, that the suit was pre-empted whether or not the Board had the power to grant the remedy requested.[3] The memorandum further urged that the Board did have the power

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[2] The Companies sought review of the ruling that the suits against the trustees were pre-empted, but did not seek review of the holding that their suits against the Union for payments into the health and welfare funds were pre-empted.

[3] In *Garmon*, the Supreme Court had stated, 359 U.S. at 247: "It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunc-

(Continued)

the Companies urged it lacked, but that whether or not this particular remedy should be granted in any given case was dependent upon the particular circumstances. The memorandum also pointed out that the Board had not been asked to order reimbursement in the underlying unfair labor practice proceeding:

> "Had the issue of recoupment been presented to the Board, it might have concluded that it would be too speculative to attempt to determine the difference between the terms that were negotiated individually and those that might have been negotiated through Cascade; or it might have concluded that a reimbursement order would be excessive for the violations found, or that to impose such a remedy would not be conducive to satisfactory bargaining relations between the parties in the future. Had the Board so ruled, it seems clear that the principles of *Garmon, supra,* would have barred any effort to recoup the benefits in a State court suit brought against the Union, the trustees, or both. Petitioners should not be in any better position merely because they failed to present the issue of recoupment to the Board." (Memorandum for the United States in No. 891, October Term, 1966, pp. 9-10)

On May 15, 1967, the Supreme Court denied the petition for a writ of certiorari. 387 U.S. 904.

SUMMARY OF ARGUMENT

Petitioners concede that they never asked the Board to grant the remedy they now urge it was error for the Board to

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[3](Continued)
tion. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict."

omit. In these circumstances, Section 10(c) of the Act, which provides that no objection not raised before the Board may be raised before the reviewing court, precludes litigation of the alleged error. Petitioners' contention that extraordinary circumstances excuse their failure to object is erroneous. Even assuming that the Board's power to grant the remedy now requested was not clear at the time the instant proceeding was litigated before the Board, there is no justification for the failure to ask the Board to grant the remedy. Had petitioners done so, they would thereby have precipitated litigation which would have clarified the matter. In these circumstances, the Board should not be required to reopen this record and give retroactive application to a subsequent expansion of its remedial powers. To impose such a requirement on the Board would cause an unwarranted disruption of the administration of the Act.

ARGUMENT

SECTION 10(e) OF THE ACT PRECLUDES LITIGATION OF PETITIONERS' CONTENTION THAT THE BOARD ERRONEOUSLY FAILED TO CONSIDER THE PROPRIETY OF A REIMBURSEMENT ORDER

More than four years since the instant proceeding was closed upon compliance with the Board's order, petitioners request this Court to remand the case with direction that the Board consider their claim that the remedial order should have included a provision requiring restitution of sums paid pursuant to individual contracts found to have been illegally obtained. Aside from the staleness of their claim, petitioners must acknowledge that at no time in the litigation of this matter before the Board did they ever ask the Board to grant the remedy they now seek.

In such circumstances, Section 10(e) of the Act clearly provides that "[n]o objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This statutory provision gives expression

to "the policy which requires that the Board's expert judgment should be brought into play by a dissatisfied litigant before recourse is had to the Courts." *N.L.R.B. v. Int'l Union of Operating Engineers, Local 66*, 357 F.2d 841, 847 (C.A. 3). Where, as here, the propriety of a proposed remedial measure is involved, it is especially important that the Board's expertise be brought into play because "the relation of remedy to policy is peculiarly a matter for administrative competence . . . ." *N.L.R.B. v. Phelps Dodge Corp.*, 313 U.S. 177, 194. Accordingly, the Supreme Court has consistently ruled that unless the Board has "patently traveled outside the orbit of its authority," *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 388, Section 10(e) preludes judicial consideration of objections to a remedial order which were not raised in the administrative proceeding. *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *N.L.R.B. v. Local 476, United Assoc. of Journeymen etc.*, 368 U.S. 401; *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350; *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 256; *May Dept. Stores Co. v. N.L.R.B.*, 326 U.S. 376, 387.

The propriety of a recoupment order in this case "admittedly was not asserted during the administrative proceeding. . ." (Petitioners' Br., p. 10).[4] Accordingly, unless "extraordinary circumstances" excuse this failure, petitioners

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[4] Similarly, petitioners admit that they had an opportunity to raise this remedial issue during the administrative proceeding. Thus, petitioners concede (Br., p. 11) that they could have objected to the Trial Examiner's initial decision in which he recommended remedial provisionsto the Board but made no mention of recoupment of sums paid under the individual contracts. As pointed out in the Counterstatement, *supra*, p. 3 , far from objecting to the Trial Examiner's rulings, petitioners filed a brief in support of the Trial Examiner's Intermediate Report and Recommended Order.

There is little need to comment at length on petitioners' contention that this was "the only point" at which it could have raised the recoupment issue before the Board and that it did not have a second chance when it filed objections to the Trial Examiner's second decision recommending dismissal of the complaint because "the question of the appropriate remedy was created only by the Board's final decision which reversed his findings" (Br., p. 11). First, there was nothing to preclude respondent from including a request for a recoupment

are precluded from urging that the Board erroneously failed to consider the propriety of a restitution order.[5] Petitioners' contend that "extraordinary circumstances" exist by virtue of the fact that it was only when it lost its suit in the Oregon courts that it became established that the preemption doctrine precluded recoupment in a state court proceeding and that it was only in Board cases decided subsequent to the close of the instant Board proceeding that it became clear that the Board had the power to grant the recoupment remedy it now seeks. We submit that petitioners have not made out a case of "extraordinary circumstances" within the meaning of Section 10(e).

In essence, petitioners' argument is that whenever the Board grants a remedy which it may not have previously ordered, any charging party in any prior Board proceeding may ask an appellate tribunal to direct the Board to reopen his case. Presumably, this principle would apply even where, as here, a case has long since been closed on compliance and the charging party had never asked the Board for the remedy it now requests because it erroneously believed the Board to be without power to issue it. Retroactive application is not even uniformly granted in the criminal law despite the fact that subsequent legal precedents have established that the defendant suffered substantial deprivation of constitutional rights. See, *Johnson v. New Jersey,* 384 U.S. 719. *A fortiori,* retroactive application is not required in an administrative proceeding of this nature. Certainly, subsequent precedent should not be grounds for excusing a failure to present a contention to the Board. Indeed, this Court has so held. In *N.L.R.B. v. Pinkerton's Nat'l Detective Agency,* 202 F.2d 230, 233, this Court had occasion to examine and reject the very contention petitioner urges here. In that case, the parties had not challenged before

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[4] (Continued)
remedy in its objections to the Trial Examiner's recommendation that the complaint be dismissed. Second, even if petitioners could reasonably have thought they were precluded from doing so, the principle that administrative remedies must be exhausted applies so long as the litigant has had an opportunity to present his arguments to the agency. He need not be afforded a second opportunity.

[5] See "Specification of Error" at Petitioners' Br., p. 8.

the Board the ruling that a union security clause was invalid. While the case was pending on appeal on other issues, this Court handed down another opinion which, if applied to the pending appeal, might require a determination that the union security clause was valid. This Court ruled that Section 10(e) applied and that the validity of the contract clause could not be raised despite the subsequent legal precedent. 202 F.2d at 232-233. The Court rejected the contention that "extraordinary circumstances" were presented (202 F.2d at 233):

> "While Section 10(e) quoted above makes an exception of cases involving 'extraordinary circumstances', the fact that our decision in the *Insulators* case was handed down shortly before the oral argument in this court cannot be regarded as such an extraordinary circumstance. We note what was said in *Sunal v. Large,* 332 U.S. 174, 182, 67 S. Ct. 1588, 91 L. Ed. 1982. There a somewhat similar hardship situation arose in a criminal case because a new, and unexpected but controlling decision had been announced after time for appeal had expired. The same reasons there given why the court declined to treat that circumstance as sufficiently extraordinary to warrant habeas corpus, apply here. Hence, a remand to the Board for consideration of a new objection or new evidence would not be appropriate. *N.L.R.B. v. Mexia Textile Mills,* 339 U.S. 563, 569."[6]

Moreover, the argument that counsel was unaware that state courts lacked jurisdiction to augment Board remedial powers or that the Board lacked power to grant a recoupment remedy of the nature now sought is not persuasive.

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[6] See also, *Wheeler v. N.L.R.B.,* 382 F.2d 172, 175 (C.A.D.C.) wherein the Court refused to disturb a Board decision not to hold a purchaser of an enterprise liable for unfair labor practices of the predecessor in the light of a subsequent Board decision announcing a new rule of successorship liability. And, there, unlike the case at bar, the litigant had urged the successorship issue at every appropriate stage of the administrative proceeding.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, was decided on April 20, 1959, prior to the commencement of the instant unfair labor practice proceeding. The Supreme Court there made it crystal clear that the preemption doctrine precluded a state court from remedying conduct which constituted an unfair labor practice, whether or not the power to issue the remedial measure sought had been withheld from the Board. See, *supra,* p. 5, n.3. Thus, there was ample reason to anticipate that if recoupment was to be obtained it would have to be requested from the Board. Moreover, whether or not the Board had previously granted reimbursement in the precise circumstances here presented, should not excuse petitioners' failure to present the issue to the Board. The Board had never ruled that it lacked power to grant this remedy and both the relevant statutory provision and the case law strongly indicated that the Board possessed ample power to require reimbursement where the circumstances warranted it. Section 10(c) of the Act provides that where the Board finds that an unfair labor practice has been committed, it "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act . . ." This grant of remedial power has been interpreted broadly by the Supreme Court almost since the Wagner Act became law. See, e.g., *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261, 262 (Section 10(c) of the Act "leave[s] to the Board some scope for the exercise of judgment and discretion in determining, upon the basis of the findings, whether the case is one requiring an affirmative order, and in choosing the particular affirmative relief to be ordered."); *I.A.M. v. N.L.R.B.,* 311 U.S. 72, 82 ("It is for the Board, not the courts, to determine how the effect of prior unfair labor practices may be expunged."); *N.L.R.B. v. Phelps Dodge Corp.,* 313 U.S. 177, 194 ("The Act does not create rights for individuals which must be vindicated according to a rigid scheme for remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace."); *N.L.R.B. v. Seven-Up Bottling Co.,* 344 U.S.

344, 351 (The Board has "the discretionary power to mould remedies suited to practical needs. . . ."). And, the Supreme Court long ago sanctioned a reimbursement remedy similar to that sought here. *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533. In this 1943 decision, the Court held that where an employer assists and dominates a labor organization, the Board has power to require him to reimburse employees for dues which he checked off and paid to that organization. The Court ruled that the Board

> "is not limited to the illustrative example of one type of permissible affirmative order [set forth in Section 10(c)], namely, reinstatement with or without backpay. . . Here the Board, in the exercise of its informed discretion, has expressly determined that reimbursement in full of the check-off dues is necessary to effectuate the policies of the Act. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." 319 U.S. at 539-540.

The issue here is not whether *Virginia Electric* can be distinguished from the remedy sought here (see Petitioners' Br., p. 6, n. 6). Rather, the point is that in light of the numerous cases, including *Virginia Electric, supra,* in which the Board's remedial powers have been acknowledged to be exceedingly broad, the failure to ask the Board for the recoupment remedy should not be excused because petitioners "could not know" (Br. p. 13) that this remedy was available to them. The short answer is, they should have asked.

In the final analysis, this appeal represents nothing more than a belated attempt to cure a litigation error. The law is well-settled that such an error does not constitute extraordinary circumstances. *Smith v. Stone,* 308 F.2d 15, 18 (C.A. 9); *Flett v. W. A. Alexander & Co.,* 302 F.2d 321, 324 (C.A. 7); *N.L.R.B. v. Izzi,* 343 F.2d 753, 755 (C. A 1). It is plain

that unless the Board is able to enforce its requirement that exceptions be filed which are both timely and specific, those requirements will be totally without meaning. Parties would be free to augment their positions, at their convenience, long after a case has been closed. In proceedings before the Board—as before any other tribunal—the failure of counsel to vigorously pursue the avenues available to him at the appropriate time must be imputed to the litigant. "Chaos would result" if any other rule were followed. *Smith v. Stone, supra,* 208 F.2d at 18. Indeed, "there would be no end of Board matters if such patent disregard of the rules must be forgiven as a matter of law . . . ." *N.L.R.B. v. Izzi, supra,* 343 F.2d at 755. It is possible that the failure to raise the recoupment issue before the Board has resulted in some loss to petitioners. However, to require the Board to reopen every case in which such a possibility could be shown would be to cast a heavy burden upon it. Petitioners' "protestations that this particular case should be revived in the interests of justice . . . overlooks how justice in the large would suffer were laxness of this sort excusable as matter of law." *Izzi, supra,* 343 F. 2d at 755. As stated by the Supreme Court in *U.S. v. Tucker Truck Lines,* 344 U.S. 33, 36-37:

> "Simple fairness to those who are engaged in the task of administration, and to litigants, requires . . . that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

The cases relied upon by petitioners are wide of the mark. In *N.L.R.B. v. Glass,* 317 F. 2d 726 (C.A. 6) the respondent sought to raise an issue which the Board conceded was litigable at the compliance stage of proceedings. The Court ruled that there was no reason "why we should not act now rather than later." Here, much more is involved than when an issue is properly litigated. The issue here is whether judicial review is entirely precluded.

In *N.L.R.B. v. Lundy Mfg. Corp.*, 286 F.2d 424, 426 (C.A. 2), the Court permitted the respondent to argue the effect of an intervening Supreme Court decision on the Board's determination that a contract was invalid. The Court pointed out that the respondent had "consistently argued" the validity of the contract to the Board, and that "it is not fatal that respondent did not include among its arguments a specific criticism, necessarily futile at that stage, of a pertinent Board decision which had been enforced by a Court of Appeals." The Court also added that the intervening Supreme Court decision constituted extraordinary circumstances which would excuse respondent's failure to add the particular subsidiary point to its general argument that the contract was valid. Whether or not the Court was right,[7] the case at bar is wholly distinguishable. Here, there was no Board case holding that the recoupment remedy now sought could not be granted, no intervening Supreme Court decision reversing the Board on the point and further, petitioners made no issue of the recoupment remedy before the Board.

In *N.L.R.B. v. Spiewak*, 179 F.2d 695, 701-702 (C.A. 3), the employer had put forth two reasons for refusing to rehire six strikers. The Trial Examiner mentioned only one of these reasons and found it an insufficient defense to the charged unfair labor practice. Although the employer's exceptions to the Trial Examiner's decision did not specifically mention the exclusion of the second reason they were "broad enough to include this within their scope." *Id.* at 701. Accordingly, the Court held that Section 10(e) was not applicable to the case. There is no comparable situation here, as petitioners filed no exceptions to the Trial

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[7] In *U.S. v. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, the Court rejected the contention that once an agency takes a position on a given issue, subsequent failures to raise the issue are excused: ". . . the commission is obliged to deal with a large number of like cases. Repetitions of the objection in them might lead to a change of policy, or if it did not the commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence."

Examiner's initial decision and the exceptions which they filed to his second decision did not even remotely raise a recoupment issue. It is true, that after holding that Section 10(c) was inapplicable to the case before it, the Court, in dictum, expressed the opinion that even if that section did apply, extraordinary circumstances were presented. It appears that all parties to the litigation were primarily concerned with whether the first reason assigned by the employer constituted a sufficient legal ground for refusing reinstatement and gave scant attention to the second reason which did not assume determinative importance until after the Board ruled adversely to the Company on the first reason. We submit that failure of counsel "to see the trees for the forest," *Spiewak, supra,* 179 F.2d at 702, should not constitute extraordinary circumstances and the cases cited in the text so hold. In any event, the *Spiewak* dictum is inapplicable here. Here, we are not dealing with a situation in which counsel pushed one theory of defense while leaving another relatively dormant. Rather, remedy is involved. Charging parties such as petitioners institute proceedings before the Board because they have suffered injury which they wish remedied. Petitioners should not be heard to say that they overlooked their injury because they were more concerned with establishing that a violation of law had occurred. At the very least, this argument is inconsistent with petitioners' major contention that they did not ask the Board for a recoupment remedy because they did not believe the Board had the power to grant it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition to review should be denied.

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April, 1968

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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